No. ~~1027~~ 68

In the

Supreme Court of The United States

OCTOBER TERM, 1958

T.I.M.E. INCORPORATED,

Petitioner and Appellee Below,

vs.

UNITED STATES OF AMERICA

Respondent and Appellant Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.....

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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, T.I.M.E. Incorporated, respectfully shows:

1.

OPINIONS OF THE COURT BELOW

The opinion of the United States District Court for the Northern District of Texas is unreported, but is found in the Record at Pages 31-38 and appended hereto (Ap-

pendix P. 17). The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 252 Federal Reporter, Second Series, Page 178, and is found in the Record at Page 50 and is appended hereto. (Appendix P. 26).

2.

JURISDICTION

The date of the judgment of the court below is January 30th, 1958, motion for rehearing overuled February 25, 1958 (R. 62).

This Court has jurisdiction under Title 28, Section 1254, (1) of the United States Code and is provided for under the rules of this Court in Rule 19, 1(b).

3.

QUESTIONS FOR REVIEW

The basic question for review may be stated thus:

(1) In a suit on past shipments instituted by a Motor Carrier operating in interstate commerce under the authority of the Interstate Commerce Commission against a shipper (United States of America) upon the *applicable* rate provided for in its tariffs, may the sole defense by the shipper that the applicable rate is unreasonable, require referral of the question of the reasonableness of the applicable rate to the Interstate Commerce Commission.

Restated:

In the absence of reparation authority in the Interstate Commerce Commission in Motor Carrier cases, may the defense, in a suit upon an applicable rate, that the applicable rate is unreasonable and being the sole issue

involved, be referred to the Interstate Commerce Commission for the determination of unreasonableness alone.

(2) The procedure for determining a reasonable rate, if referral is permissible, on past Motor Carrier shipments.

4.

STATUTES APPLICABLE

The relevant portion of Section 217 of Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 560, 49 U.S.C.A. Sec. 317(a), (b) and (c) provides:

> "(a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, * * *"
>
> "(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares and charges specified in the tariffs in effect at the time, and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except

such as are specified in its tariffs: Provided, that the provisions of Section 1 (7) and 22 of this title shall apply to common carriers by motor vehicles subject to this chapter.

"(c) No change shall be made in any rate, fare, charge, or classification, or any rule, regulation, or practice affecting such rate, fare, charge, or classification, or the value of the service thereunder, specified in any effective tariff of a common carrier by motor vehicle, except after 30 days' notice of the proposed change filed and posted in accordance with paragraph (a) of this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The commission may, in its discretion and for good cause shown, allow such a change upon notice less than that herein specified or modify the requirements of this section with respect to posting and filing of tariffs either in particular instances or by general order applicable to special or pecular circumstances or conditions."

The relevant portion of Section 222 of Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 564, 49 U.S.C.A. Sec. 322 (b) and (c), provides:

"(b) If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for

any district where such motor carrier or broker operates, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, or condition: * * *"

"(c) Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof, who . . . shall knowingly and willfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this chapter for less than the applicable rate, fare, or charge, . . . shall be deemed guilty of a misdeameanor and upon conviction thereof be fined not more than $500 for the first offense and not more than $2,000 for any subsequent offense."

The relevant portion of Section 216 of Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 558, 49 U.S.C.A. Sec. 316(e), (g) and (j) provides:

"(e) Any person, state board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of Section 317 of this title. Whenever, after hearing . . . the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classifica-

tion, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge *thereafter* to be observed, or the lawful classification, rule, regulation, or practice *thereafter* to be made effective . . . ."

"(g) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and/or express, and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Commission is authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement, in writing, of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such

rate, fare or charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare or charge, or classification, rule, regulation, or practice, shall go into effect at the end of such period. * * *"

"(j) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

The relevant portion of Section 204a of Part II of the Interstate Commerce Act, June 29, 1949, c. 272, 63 Stat. 280, 49 U.S.C.A. Sec. 304a (2)(5), provides:

"For recovery of overcharges, action at law shall be begun against common carriers by motor vehicle subject to this chapter within two years from the time the cause of action accrues, and not after, subject to Paragraph (3) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice."

(5) "The term 'overcharges' as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission."

Compare same provisions Federal Power Act 16 USC 824d-e (Appendix Page 36). *Contrast* provisions Part I of Interstate Commerce Act (Railroads) Sec. 15, as amended Feb. 28, 1920 ch. 91, 41 Stat. 486, 49 USC Sec. 15(7) (Appendix P. 34). Sec. 16 of Part I Interstate Commerce Act, as amended June 7, 1924, ch. 325, 43 Stat. 633, September 18, 1940, ch. 722, 54 Stat. 913, 49 USC Sec. 16 (Appendix Page 35).

STATEMENT OF THE CASE

This case was brought by Petitioner against Respondent for freight charges under Tucker Act 28 USC Art. 1346 (2).

The case was submitted upon stipulated facts. (R. 17-30) As reflected by the stipulations, the example issue is the following: Respondent made a shipment of scientific instruments over the petitioner from Tinker Air Force Base, Marion, Oklahoma to McClellan Air Force Base, Planehaven, California. This shipment was moved by petitioner and its connecting line from origin via El Paso, Texas to Los Angeles, California. (R. 18) Rocky Mountain Motor Tariff Bureau Tariff No. 5-A, M.F.-I.C.C. No. 31 named a through rate from Marion, Oklahoma to Planehaven, California in the amount of $10.74 per cwt., which is double first class. (R. 19)

There also appeared a rate in Southwestern Motor Freight Tariff Bureau Tariff 1-5, M.F.-I.C.C. No. 141 naming a rate from Marion, Oklahoma to El Paso, Texas at $2.56 per cwt. (R. 19)

There was also on file a rate that appeared in Interstate Freight Carriers Conference Tariff No. 1-C, M.F.-I.C.C. No. A-5 naming a rate at $4.35 per cwt. from El Paso, Texas to Planehaven, California.

T.I.M.E. Incorporated was a party to each of these three tariffs.

Southwestern Motor Freight Tariff Bureau tariffs do not name a rate between Marion, Oklahoma, on the one hand, and between Planehaven, California, on the other hand. (R. 20) The Interstate Freight Carriers Conference tariffs do not name a rate between Marion, Oklahoma and Planehaven, California (R. 20) The Rocky Mountain Motor Tariff Bureau tariff does name a through rate between Marion, Oklahoma and Planehaven, California, but does not name a rate between Planehaven, California and El Paso, Texas nor between Marion, Oklahoma and El Paso, Texas. (R. 20)

The District Court applied the applicable rate. (R. 41) The Court of Appeals directed the District Court to refer the question of reasonableness to the Interstate Commerce Commission. (R. 58)

Petitioner's Petition for Rehearing, (R. 59) was denied. (R. 62) The sole defensive issue presented was that the applicable rate is unreasonable.

REASONS FOR GRANTING OF WRIT

This case presents an important Federal question not heretofore passed on by this Court concerning the law on applicable rates named in Motor Carrier tariffs, and,

equally important, the Federal Court procedure for the determination of a reasonable rate if the applicable rate is attacked.

(1) The Interstate Commerce Commission, in Motor Carrier cases, is without reparation authority. The procedure directed in this case by the Court of Appeals would indirectly grant authority to the Interstate Commerce Commission by aid of a Federal Court to grant reparation on past shipments moving on the applicable rate, which authority and jurisdiction to so grant was withheld by Congress. The Court of Appeals relied on the announced doctrine by this Court stated in *United States vs. Western Pacific R. Co.*, 352 U.S. 59, and applied it to the facts in this case; the Court below sets up a procedure granting possible reparations on past shipments not authorized by Congress (specifically withheld). The Court below is in direct conflict with the holding of this Court in *Montana-Dakota Utilities co. vs. Northwestern Public service Co.*, 341 U. S. 246.

(2) This important Federal procedure question, that is, the reasonableness of an applicable rate being attacked by a shipper, the advisability or lawfulness of holding a case in abeyance in a Motor Carrier case for the sole purpose of submission of the reasonableness of the rate to the Interstate Commerce Commission; the question of granting the Commission, by the directed procedure in the Court below, to indirectly authorize reparation on past shipments.

(3) The direct conflict between the holding of the Court below in this case and the holding of this Court in the *Montana-Dakota* case.

None of these questions have been passed on by this Court.

ARGUMENT

The official issue of the Interstate Commerce Commission Tariff M.F.-3, Rule 4 (i) reads:

> "When a carrier or *carriers* establish a local or joint rate for the application over *any route* from point of origin to destination, such rate is the applicable rate of such carrier or carriers over the authorized route, notwithstanding that it may be higher than the aggregate of the intermediate rates over such route." (R. 20)

Petitioner contended that the through rate applying in Rocky Mountain Motor Tariff Bureau tariff applies. (R. 20) The respondent, on the other hand, contended that the combination of local or intermediate rates from Marion, Oklahoma to El Paso, Texas and from El Paso, Texas to Planehaven, California applies. (R. 20) The District Court found that the through rate was applicable. (R. 31) This finding was not appealed from.

The respondent filed its Motion to Hold Judgment in Abeyance based upon:

> "..... the United States of America now desires to commence an action before the Interstate Commerce Commission for a determination of the question, which is within the exclusive jurisdiction of the Commission." (The question being the alleged unreasonableness of the rate applied). (R. 35).

The District Court overruled this motion, (R. 38), and entered its judgment applying the through rate as the applicable rate. (R. 41) The sole question on appeal was the reasonableness of the applicable rate. (R. 44-45) The Circuit Court of Appeals reversed and remanded.

"On consideration whereof, it is now Heard, Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded, to the said District Court with directions to grant the Motion to Hold the Judgment in Abeyance to enable the Government to obtain a determination from the Interstate Commerce Commission with respect to the reasonableness of the through rate as applied to the transportation services here involved." (R. 58)

In the view of petitioner, the opening of our Federal Courts to suits to raise the issue of the reasonableness of *applicable rates* will create a chaotic condition in the Motor Carrier industry in applying its tariff rates. The suggested procedure by the Court below will still leave the question that if the applicable rate is unreasonable; what is a reasonable rate and how can it be determined?

This Court may take judicial knowledge that there are approximately 1,100 carriers members of the Rocky Mountain Motor Tariff Bureau. Sec. 1, Page 4-58, Rocky Mountain Transcontinental Territorial Directory No. 20-B, MF-ICC No. 101. Many of these carriers are not parties to the Southwestern Motor Freight Bureau tariff No. 12-J, MF-ICC No. 255, Page 3-11. Their combination of transcontinental routes are not all via El Paso. Is the rate applicable over one route reasonable by one group of carriers and over another route unreasonable?

The suggested procedure will create an impossible economic condition in applying and collecting applicable rates now on file or approved by the Interstate Commerce Commission, i.e., merely the expense of prosecuting or defending. The ordered procedure will create a multi-

plicity of suits, most times on insignificant amounts, or the accumulation of insignificant amounts to reach the jurisdiction of the Federal Court, in amount, or on a Federal question. The suit will then go to the Federal Court; as ordered it will be held in abeyance for referral to the Interstate Commerce Commission and under the doctrine announced by the Fifth Circuit, the Commission could make a finding that the applicable rate was unreasonable and still leave open the question of what is a reasonable rate.

The Supreme Court of the United States, through its majority, said in Montana-Dakota Utility Company vs. Northwestern P.S.C. 341 U.S. 246:

> "..... It is admitted, however, that a utility could not institute a suit in a Federal Court to recover a portion of past rates which it simply alleges were unreasonable. It would be out of Court for failure to exhaust administrative remedies, for, at any time in the past, it could have applied for and secured a review and, perhaps, a reduction of the rates by the Commission ....."

It also said:

> "..... Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a Court can authorize commerce in the commodity on other terms.

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable....."

It also said:

"....It is true that in some cases the Court has directed lower federal courts to stay their hands pending reference to an administrative body of a subsidiary question. Smith vs. Hoboken R.W. & S.S.C. Co. 328 US 123, 90 L ed 1123, 66 S Ct 947, 168 ALR 497; Thompson vs. Texas Mexican R. Co. 328 US 134, 90 L ed 1132, 66 S Ct. 937; General American Tank Car Corp. vs. El Dorado Terminal Co. 308 US 422, 84 L ed 361, 60 S Ct. 325. But in all those cases the plaintiff below concededly stated a federally cognizable cause of action, to which the referred issue was subsidiary. In no instance have we directed a court to retain a case in which it could not determine a single one of its vital issues . . . ."

It also said:

"....If the Court is presented with a case it can decide but some issue is within the competence of an administrative body, in an independent proceeding, to decide, comity and avoidance of conflict as well as other considerations make it proper to refer that issue. But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the Commission

power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent.

"It is urged that this leaves petitioner without a remedy under the Power Act. We agree. In that respect, petitioner is no worse off after losing its lawsuit than its customers are if it wins. Unless we are to assume that this company failed to include its buying costs in its selling rates, we must assume that any unreasonable amounts it paid suppliers it collected from consumers. Indeed, this is the assumption made by the Commission in its brief as amicus curiae here. It is admitted that, if it recoups again what it has already recouped from the public, there is no machinery in or out of court by which others who have paid unreasonable charges to it can recover.

"Under such circumstances, we conclude that, since the case involves only issues which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide, it must decline the case forthrightly rather than resort to such improvisation . . . ."

The minority said:

" . . . . . Despite the unqualified statutory declaration that unreasonable rates are unlawful, we think it clear that Congress did not intend either court or Commission to have the power to award reparations on the ground that a properly filed rate or charge has

in fact been unreasonably high or low. If that were all the complaint before us showed, we would agree that recovery of damages in a civil action would not be an appropriate remedy, and that the complaint should have been dismissed . . . ."

In *United States vs. Western Pacific R. Co.* 352 U. S. 59 followed by the Court below is distinguishable from, and is different from, the facts in the case at bar. This case may be distinguished from Montana-Dakota (1) It applied to rail rates, (2) It involved two limitation statutes, a two-year statute in seeking reparations (Lawfully allowed in Part I of the Interstate Commerce Act), and the limitation upon filing actions in the Court of Claims, and, (3) the issue in the Western-Pacific case was not the reasonableness of the applicable rate. It involved the highly technical question of "what was the applicable rate?", and, (4) the Court directed the referral of a question to the Interstate Commerce Commission which had jurisdiction by original action to determine.

The case at bar involves solely the issue of the reasonableness of the applicable rate.

7.

CONCLUSION

For the reasons setforth above it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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APPENDIX

Opinion of District Court:

"THE APPLICABLE RATE

The through rate from Marion, Oklahoma, to Planehaven, California published in the Rocky Mountain Motor Tariff Bureau, Tariff 5-A, M.F.-I.C.C. No. 31, is the proper charge for the shipments in question, not only in conformity with the Interstate Commerce Commission, Tariff M.F. 3, Rule 4 (i), but also upon the authority of the only case coming to my notice, which seems directly in point, that is, T. & M. Transportation Co. vs. S. W. Shattuck Chemical Company, 148 Fed. 2d 777. The suggestion of counsel that the aforesaid Tariff M.F. 3, Rule 4 (i), is not applicable to the Government, in view of 31 U.S.C. 71, does not seem sound. There is no such explicit provision in the cited statute. The rule recognized in the decisions is that, in making contracts for the transportation of property by common carriers, the Government stands in the same attitude as any other shipper. Hughes Transportation, Inc. vs. United States, 121 F. Supp. 212.

"THE PLASTIC DOMES

The proper covering classification for this property is that describing 'Airplane Parts, NOI, made of plastics, synthetic gums or resins, in boxes or crates', published in Rocky Mountain Motor Tariff Bureau, Tariff No. 5-A, M.F.-I.C.C. No. 31, Item 120, combined with Rule 15, which is a subject covered in the filed stipulations.

"AIRCRAFT AILERONS

The proper covering classification for this property is that describing 'Wing panels or sections; in boxes or crates', published in National Motor Freight Classification No. 11, Item 2940, which is a subject covered in the filed stipulations. The Encyclopedia Britannica says that an aileron 'is a movable part of the wing of an aeroplane.'

"The brief of Government counsel has forecast that, presumably, said counsel will now request that judgment herein be held in abeyance while they file an action with the Interstate Commerce Commission to determine the reasonableness or unreasonableness of the through rate herein mentioned, and, ordinarily, in instances somewhat similar, that course has been approved. General American Tank Car Corp. vs. Eldorado Terminal Co., 308 U.S. 422; U. S. vs. Kansas City Southern Ry. Co., 217 Fed. 2d 763. But, in this instance, plaintiff's counsel seems to contend that, in respect to motor carriers, the Interstate Commerce Commission has no authority to decide the reasonableness or unreasonableness of a rate retrospectively as a basis for a reparation ordered by the Commission, or in support of a suit to recover an alleged overcharge by judicial judgment. This seems doubtful to me, just on the face of it, but I have not gone into the question closely, and if Government counsel do move to hold this case at rest, pending action before the Commission, then I would want to know whether such an order would serve any useful purpose, and, consequently, a thorough brief should be presented on the question above mentioned.

"Awaiting replies from respective counsel, I am,

Sincerely yours,
/s/ Jos. B. Dooley
United States District Judge"

"DEFENDANT'S MOTION TO HOLD JUDGMENT IN ABEYANCE:

"Filed: July 18, 1956

"Comes now, United States of America, defendant and cross plaintiff in the above numbered and entitled cause and respectfully moves the Court to hold in abeyance the entry of judgment herein for the length of time hereinafter set out, and for the following reasons:

1.

"This action was commenced by T.I.M.E. Incorporated, plaintiff, to recover from the United States of America, defendant, certain transportation charges on shipments originating at Marion, Oklahoma, and transported by plaintiff through El Paso, Texas, to Planehaven, California. In its answer defendant alleged that the aggregate of intermediate rates to and from El Paso is the applicable rate to said shipments rather than the through rate contained in Rocky Mountain Tariff Bureau as applied by T.I.M.E. Incorporated. The Court has determined this question adversely to the Government.

"In addition to its contention as to the applicable rate, defendant alleged that such through rate is *prima facie* unreasonable and, therefore, unlawful

to the extent that it exceeds the aggregate of the intermediate rates to and from El Paso. Since this Court does not have jurisdiction to determine the reasonableness or unreasonableness of the rate to be applied, the United States of America now desires to commence an action before the Interstate Commerce Commission for a determination of that question, which is within the exclusive jurisdiction of the Commission.

2.

"The United States of America has not filed an action before the Commission for such determination because of its contention that the only rate applicable to the forms in question is the aggregate of the intermediates, and no action before the Commission could be commenced until this Court had determined the applicable rate.

3.

"No hardship will fall on plaintiff by the Court's delay since even under the Court's adverse decision the Government will be entitled to a money judgment.

"WHEREFORE, the United States of America respectfully moves the Court to hold the entry of judgment in this case in abeyance for a period of sixty days from the granting of this motion, to afford her an opportunity to apply to the Interstate Commerce Commission for a determination of the reasonableness or unreasonableness of the rate which the Court

deems applicable to the shipments involved herein and if such proceeding is commenced within such sixty day period then to continue to hold the judgment in abeyance until the Commission has finally determined the reasonableness or unreasonableness of the applicable rate.

Respectfully submitted,

Heard L. Floore
United States Attorney

/s/ John A. Lowther,
John A. Lowther, Assistant
United States Attorney"

"OPINION OF DISTRICT COURT ON MOTION TO HOLD IN ABEYANCE:

"The defendant's motion to hold the entry of judgment in abeyance pending proceedings before the Interstate Commerce Commission is overruled and such an order should be presented promptly.

"This ruling results from the conclusion that Montana-Dakota Utilities Co. vs. Northwestern Public Service Co., 341 U. S. 246, and McClellan vs. Montana-Dakota Utilities Co., 104 F. Supp. 46, affirmed 204 F. 2d 166, certiorari denied 346 U. S. 826, are decisive against said motion.

"Ordinarily the Interstate Commerce Commission, like the United State Maritime Commission (Shipping Act, U. S. Code, Title 46, Para. 817 and 821), in con-

nection with reparation authority, may review the reasonableness of rates charged in past shipments. This is true in respect to railroads, (Interstate Commerce Act, U. S. Code, Title 49, Para. 13 (1)), and with respect to water carriers, (Interstate Commerce Act, U. S. Code, Title 49, Para. 907 (b) and 908 (b), (c), (d)), but that jurisdiction is lacking in respect to motor carriers (Interstate Commerce Act, U. S. Code, Title 49 Para. 316 (e)). The Civil Aeronautics Board, as the administrative agency over the air carriers, has no reparation authority nor jurisdiction to review rates as to past transportation, (Civil Aeronautics Act, U. S. Code, Title 49, Para. 642 (d)). The same limitation of authority is found in the Natural Gas Act, U. S. Code, Title 15, Para. 717d (a), and in the Federal Power Act, U. S. Code, Title 16, Para. 824e (a). The legislative policy for these differences may not be evident, but there can be no doubt that the distinction is clearly manifested.

"The Montana-Dakota Utilities Co. vs. Northwestern Public Service Co. case arose under the Federal Power Act and it will be noticed that the crucial statutory article cited in that decision in the presently material part is virtually word for word the same as the parallel statutory article dealing with motor carriers. In other words, I am unable to see any substantial difference in principle between that case and the present suit. Moreover, the denial of the present motion is also supported in Slick Airways vs. American Airlines, 107 F. Supp. 199, 212, where the court said 'if the instant complaint merely sought to recover

damages under the Civil Aeronautics Act on account of unfair competitive practices committed, or unreasonable rates charged, by defendants, I would agree that it would not state a cause of action in this court.'

"It is true that the action on the present motion is contrary to the decision in Bell Potato Chip Co. vs. Aberdeen Truck Lines, 43 M.C.C. 337, which was decided before the Montana-Dakota case, and, likewise, contrary to the decision in New York-New Brunswick Auto Express Co. Inc. vs. The United States, 126 F. Supp. 215, cited by Government counsel, as well as the strongest case for the Government, United States vs. Garner, 134 F. Supp. 16, but the Montana-Dakota case was not mentioned in either of the two opinions and probably did not come to the notice of the Court.

Sincerely yours,

/s/ Jos. B. Dooley

United States District Judge"

"JUDGMENT OF DISTRICT COURT:

"On this day came on to be considered the above styled cause; the Court having tried the case in June of 1956 and having considered the evidence, the stipulation and contentions of the respective parties, and the defendant having filed its motion to hold the entry of judgment in abeyance pending the instituting

of proceedings before the Interstate Commerce Commission, and it appearing that such motion should be overruled, the Court finds:

"That the through rate from Marion, Oklahoma to Planehaven, California published in Rocky Mountain Motor Tariff Bureau, Tariff 5-A, M.F.-I.C.C. No. 31, is the only proper charge for the shipments in question, in conformity with the Interstate Commerce Commission Tariff Circular M.F. No. 3, Rule 4(i), and that Rule 4(i) is applicable to the Government.

"The Court further finds that the proper covering classification for a shipment of 'Domes, Airplane, Cellulose, Derivatives, Plastic and Metal Combined' is 'Airplane parts, NOI, made of plastics, synthetic gums or resins, in boxes or crates', as published in Rocky Mountain Motor Tariff Bureau 5A, M.F.-I.C.C. No. 31, Item 120, combined with Rule 15.

"The Court further finds that the proper covering classification on a shipment billed as '8 boxes aircraft ailerons' is covered in the tariff described as 'wing panels or sections; in boxes or crates', as published in National Motor Freight Classification No. 11, Item 2940.

"The Court is of the opinion that the motion of the defendant to hold the entry of the judgment in abeyance pending proceedings to be instituted before the Interstate Commerce Commission should be overruled and that jurisdiction is lacking in the Interstate Commerce Commission in respect to Motor Carriers to review the reeasonableness of rates charged on past shipments.

"It is, therefore, ORDERED, ADJUDGED AND DECREED BY THE COURT AS FOLLOWS:

(a) That the motion of the defendant to hold the entry of the judgment in abeyance pending proceedings to be instituted before the Interstate Commerce Commission is overruled.

(b) That the defendant, United States of America, owes plaintiff, T.I.M.E. Incorporated the sum of $14,414.82, and that plaintiff, T.I.M.E. Incorporated is indebted to the defendant, United States of America, in the sum of $16,942.03, and accordingly the defendant, United States of America, on its cross action against T.I.M.E. Incorporated is awarded judgment against plaintiff, T.I.M.E. Incorporated for the sum of $2,527.21.

(c) That each party hereto pay the costs incurred by it.

(d) That all other relief herein prayed for is hereby specifically denied.

Entered this the 5th day of March, 1957.

/s/ Jos. B. Dooley
United States District Judge"

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16738

UNITED STATES OF AMERICA,

Appellant,

versus

T.I.M.E., INCORPORATED,

Appellee

Appeal from the United States District Court for the Northern District of Texas.

(January 30, 1958.)

Before HUTCHESON, Chief Judge, and RIVES and JONES, Circuit Judges: T.I.M.E., Incorporated, a motor carrier, sued the United States under the Tucker Act[1] for unpaid transportation charges on shipments of freight. The United States asserted counterclaims upon which the district court held that it was entitled to $16,942.03, and that holding is not contested on appeal.

[1] 28 U.S.C.A. Sec. 1346 (a)(2).

This appeal involves solely the question of the correctness of the district court's determination that T.I.M.E. was entitled to a total of $14,414.82 on its claims.

The facts were stipulated. T.I.M.E. was a common carrier motor carrier operating generally between Oklahoma City, Oklahoma and Los Angeles, California via El Paso, Texas, under authority of the Interstate Commerce Commission. It transported some twenty shipments of scientific instruments under Government bills of lading. A typical shipment illustrates the issues with respect to all of the shipments: it originated at Tinker Air Force Base, Marion, Oklahoma, and was transported over the lines of T.I.M.E. and a connecting carrier to McClellan Air Force Base at Planehaven, California.

At the time, there were on file with the Interstate Commerce Commission the following tariffs to which T.I.M.E. was subject:

(1) Rocky Mountain Motor Tariff Bureau Tariff No. 5-A, M.F.-ICC No. 31, providing a double first-class through rate of $10.74 per cwt. on scientific instruments N.O.I. from Marion, Oklahoma to Planehaven, California.

(2) Southwestern Motor Freight Bureau Tariff No. 1-F, M.F.-ICC No. 141, providing a rate of $2.56 per cwt. on scientific instruments N.O.I. from Marion, Oklahoma to El Paso, Texas.

(3) Interstate Freight Carriers Conference Tariff No. 1-C, N.F.-ICC No. A-5, providing a rate of $4.35 per cwt. on scientific instruments N.O.I. from El Paso, Texas to Planehaven, California.

The through rate, $10.74, was thus considerably in excess of the sum of the intermediate rates, $6.91. There was, however, on file with the Commission the official issue of the Interstate Commerce Commission Tariff M.F.-3, Rule 4(i), which reads:

> "(i) When a carrier or carriers establish a local or joint rate for application over any route from point of origin to destination, such rate is the applicable rate of such carrier or carriers over the authorized route, notwithstanding that it may be higher than the aggregate of the intermediate rates over such route."

The Government had paid the intermediate rates. The district court held that T.I.M.E. was entitled on its claims to a total of $14,414.82, the difference between the through rate and the aggregate of the intermediate rates.[2] The Government made some contention at the trial that the combination of the intermediate rates is applicable, but that position is not urged on appeal. The Government's main defense, which it continues to urge in this Court, is that the through rate is prima facie unreasonable and unlawful to the extent that it exceeds the aggregate of the intermediate rates, and that the proceedings should be stayed to enable the Government to obtain a determination from the Interstate Commerce Commission as to the reasonableness or unreasonableness of the rate to be applied.

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[2] Because of the larger amount of the Government's counterclaims, $16,942.03, not now in issue, judgment was entered in favor of the United States in the amount of $2,527.21.

Under Tariff M.F.-3, Rule 4(i), quoted *supra*, the fact that the through rate is higher than the aggregate of the intermediate rates does not prevent it from being the applicable rate of the carrier. The Commission has often ruled, however, that through rates are prima facie unjust and unreasonable to the extent that they exceed the combination of local rates from and to the same points.[3]

Section 216 (c) of the Interstate Commerce Act, 49 U.S.C.A. 316(c), provides that: "Common carriers of property by motor vehicles may establish reasonable through routes and joint rates, charges, and classifications" with other carriers. Section 216 (d), 49 U.S. C.A. 316(d), provides that: all carges of motor carriers for services covered by the Act "shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful." Section 204(c), 49 U.S.C.A. 304 (c), provides that: upon complaint or upon its own initiative the Commission may investigate whether any motor carrier has failed to comply with any provision of the chapter or with any requirement established pursuant thereto, and issue an appropriate order to compel compliance.

Section 13, et seq. of the Act, 49 U.S.C.A. 13, et seq., dealing with railroads, gives the Commission authority to award reparations, subject to a two-year limitation period, Section 16 (3), 49 U.S.C.A. 16(3); but part II

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[3] See Kingan & Co. v. Olson Transportation Co., 32 M.C.C. 10; Stokely Foods, Inc. v. Foster Freight Line, Inc., 62 M.C.C. 179; United States v. Davidson Transfer & Storage Co., Inc., No. MC-C-1849, decided October 14, 1957.

of the Act covering motor carriers contains no similar provision. Nevertheless, the Commission has consistently held that the general powers conferred upon it in the sections already mentioned and in other sections furnish authority to determine the reasonableness of a past rate, the lawfulness of which is brought into issue in a judicial proceeding.

Holdings to that effect had been made in a long line of decisions by divisions of the Commission.[4] In *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M.C.C. 337, the full Commission undertook a "thorough re-examination" of its authority to "make an administrative determination of the lawfulness of rates charged on past shipments," and concluded that the earlier decisions of its divisions were correct. The opinion in the *Bell Potato Chip Co.* case, *supra*, was reconsidered at length and approved by the Commission in the very recent case of *United States v. Davidson Transfer & Storage Co., Inc.*, No. M-C-1849, decided October 14, 1957.

This construction of the Act by the body charged with primary responsibility for its administration is, of course, entitled to great weight by the courts.[5] Following such

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[4] See W. A. Barrows Porcelain Enamel Co. v. Cushman M. Delivery, 11 M.C.C. 365, 367; Hausman Steel Co. v. Seaboard Freight Lines, Inc., 32 M.C.C. 31; Dixie Mercerizing Co. v. ET and WNC Motor Transp. Co., 21 M.C.C. 491, affirmed on reconsideration, 41 M.C.C. 355; Koppers Co. v. Langer Transport Corp., 12 M.C.C. 741; Hill-Clarke Machinery Co. v. Webber Cartage Lines, Inc., 26 M.C.C. 144; Patten Blinn Lbr. Co. v. Southern Ariona Freight Lines, 31 M.C.C. 716.

[5] See United States v. Bergh, 1956, 352 U.S. 40, 47; Adams v. United States, 1943, 319 U.S. 312; 314-315; United States v. Citizens Loan & Trust Co., 1942, 316 U.S. 209, 214; Inland Waterways Corp. v. Young, 1940, 309 U.S. 517; United States

construction, the Court of Claims and another district court have looked to the Commission for aid in the disposition of suits involving past motor carrier rates alleged to be unreasonable.[6]

The district court in the present case thought that the case of *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, precluded it from holding the entry of judgment in abeyance pending proceedings before the Interstate Commerce Commission. That was a five-to-four decision in which the majority held that the complaint stated no federally cognizable cause of action to which the referred issue was subsidiary. After full discussion, that case was distinguished in the report of the Commission in *United States v. Davidson Transfer & Storage Co., Inc., supra*, with the conclusion that:

> " * * * However, we do not interpret the *Montana-Dakota* case as holding that where a cause of action to which the issue of reasonableness is subsidiary is maintainable in the court in which it is brought, reasonableness issue may not be determined by the proper administrative body."

In *United States v. Western Pacific R. Co.*, 1956, 352 U. S. 59, 72, it was argued that, because Section 16 (3)

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v. American Trucking Associations, Inc., 1940, 310 U.S. 534, 549; United States v. Madigan, 1937, 300 U.S. 500, 506; Norwegian Nitrogen Co. v. United States, 1933, 288 U.S. 294, 315; United States v. Jackson, 1930, 280 U.S. 183, 193; Edwards's Lessee v. Darby, 1827, 12 Wheat. (25 U.S.) 207, 210.

[6] New York & New Brunswick Auto Express Co. v. United States, Ct. of Cl. 1954, 126 F. Supp. 215; United States v. Garner, E.D.N.C. 1955, 134 F.Supp. 16.

of the Act prevented the Commission from considering complaints for overcharges against railroad carriers not filed within two years from the time the cause of action accrued, that the Commission was barred absolutely from hearing questions as to the reasonableness of rates arising in suits brought after two years, whether such questions came to the Commission by way of referral or an original suit. The Supreme Court held:

> " • • • that the limitation of Sec. 16 (3) does not bar a reference to the Interstate Commerce Commission of questions raised by way of defense and within the Commissions' primary jurisdiction, as were these questions relating to the applicable tariff."

United States v. Western Pacific R. Co., supra at p. 74

The case of *United States v. Chesapeake & Ohio R. Co.*, 1956, 352 U.S. 77, 81, decided on the same day, is to the same effect. From those decisions, it would seem to follow that the Commission's lack of power to award reparations does not negative its authority to determine the reasonableness of a filed rate, when that issue is incident to a federally cognizable cause of action pending in court.

Congress undertook, in terms, to save existing common law and statutory rights and remedies. Section 216 of the Act, 49 U.S.C.A. 316, relating to the duty to establish reasonable rates, concludes with a provision that: "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent here-

with." Very clearly, the district court could not itself undertake an independent investigation into the reasonableness of the rate. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426. The court, then, had the alternative either of denying the shipper any remedy against a filed rate, which on its face was prima facie unreasonable and unlawful, or of holding its judgment in abeyance to permit a determination of the reasonableness of the rate by the Interstate Commerce Commission. In our opinion, the second alternative is more consistent with justice, with the terms of the Interstate Commerce Act, and with the cases. The judgment of the district court is, therefore, reversed and the cause remanded with directions to grant the motion to hold the judgment in abeyance to enable the Government to obtain a determination from the Interstate Commerce Commission with respect to the reasonableness of the through rate as applied to the transportation services here involved.

REVERSED AND REMANDED WITH DIRECTIONS.

Part I, I.C.C. Act (Rail Carriers):

The relevant portion of Section 15 of Part I of the Interstate Commerce Act, as amended February 28, 1920, c. 91, 41 Stat. 486, 49 U.S.C.A. Sec. 15 (7) provides:

> "(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers, affected thereby a statement in writing or its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made

within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. * * *"

The relevant portion of Section 16 of Part I of the Interstate Commerce Act, as amended June 7, 1924, c. 325, 43 Stat. 633, September 18, 1940, c. 722, 54 Stat. 913, 49 U.S.C. 16 (3)(b) provides:

(3)(b) "All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph.

(c) "For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this chapter within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph, except that if claim for the overcharge has been presented in writing to the carrier within the

two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(g) "The term 'overcharges' as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission."

POWER ACT:

The relevant portion Sec. 205a et seq. of the Act, 49 Stat. 851, ch. 687, 16 USC, Sec. 824d (a) etseq (16 USCA 824d (a) - (c) P. 624):

"824d. Rates and charges; schedules; suspension of new rates,

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such timeand in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the law-

fulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions

preference over other questions pending before it and decide the same as speedily as possible. June 10, 1920, c. 285, Para. 205, added August 26, 1935, c. 687, Title II, Para. 213, 49 Stat. 851."

Sec. 206 (a); 49 Stat. 852, ch. 687, 16 USC 824e (a)-(b), (16 USCA 824e P. 625).

"824e. Power of Commission to fix rates and charges; determination of cost of production or transmission.

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, reasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State Commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. June 10, 1920, c. 285, Para. 206, added Aug. 26, 1935, c. 687, Title II, Para. 213, 49 Stat. 852."